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Supreme Court, U.S.
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No. 00-1054

IN THE

Supreme Court of the United States

TOMMY RANDELL,

Petitioner,

v.

GARY L. JOHNSON, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

Respondents advance two arguments against certiorari. First, they argue that the question presented is not adequately presented by Randell's case. Opp. at 5-8. Second, they argue that there is no clearcut, longstanding conflict in the circuits concerning whether a person not "in custody" under 28 U.S.C. § 2254(a) may bring an action under 42 U.S.C. § 1983 seeking damages relating to a previous criminal conviction or incarceration. We address these arguments in reverse order.

1. The lower courts are hopelessly divided over whether the *Heck* decision imposes any barrier to Section 1983 actions filed by persons who are not "in custody" within the meaning of 28 U.S.C. 2254(a)

In its decision below, App. 3a-4a, the Fifth Circuit acknowledged the existence of a circuit split over the breadth of the favorable-termination requirement articulated in *Heck v. Humphery*, 512 U.S. 477 (1994), particularly in light of *Spencer v. Kemna*, 523 U.S. 1 (1998). The petition briefly expanded on this discussion. The Second and Seventh Circuits, in accord with the analysis of five Justices in *Spencer*, view *Heck* as imposing no barrier to a Section 1983 action attacking a conviction or instance of incarceration brought by a person who is not "in custody" within the meaning of 28 U.S.C. § 2254(a). Pet. 11-13. The First, Fifth, Sixth and Ninth Circuits read *Heck* much more broadly as blocking a Section 1983 action unless and until the plaintiff first wins habeas or other relief wiping away the conviction or sanction at issue, even where the plaintiff is not in custody and thus habeas relief is not available. Pet. 13-14.

Respondents argue that the conflict identified by the Fifth Circuit below and explicated by Randell "is shallow at best." Opp. 9. They dismiss as insignificant or wrong the pertinent Second and Seventh Circuit decisions. Opp. 9-12. Respondents err in ignoring the statutory construction of the intersection between the habeas and civil rights statutes that has been

consistently relied upon in those decisions, in the way advocated by five Justices in *Spencer* — a construction that is quite different from the way that several other circuits read these statutes.

Respondents' discussion of *Spencer*, Opp. 5-7, skips over the basic statutory construction involved. In *Spencer*, five Justices "read the 'general' § 1983 statute in light of the 'specific' federal habeas statute, which applies only to persons 'in custody,' 28 U.S.C. § 2254(a), and requires them to exhaust state remedies, § 2254(b)" — a statutory construction that provides "a 'simple way to avoid collisions at the intersection of habeas and § 1983.'" 523 U.S. at 20 (Souter, J., joined by O'Connor, Ginsburg and Breyer, JJ., concurring) (quoting Justice Souter's concurring opinion in *Heck*); *see also id.* at 25 n.8 (Stevens, J., dissenting). Under this statutory construction, *Heck*'s favorable-termination requirement applies only to "inmates seeking § 1983 damages for unconstitutional conviction or confinement . . . lest the plain breadth of § 1983 be unjustifiably limited at the expense of persons not 'in custody' within the meaning of the habeas statute." *Id.* at 20.

This statutory construction creates a bright-line rule for the application of *Heck*'s favorable-termination requirement, one focusing on whether or not the Section 1983 plaintiff is "in custody" within the meaning of 28 U.S.C. § 2254(a). The Second and Seventh Circuits have consistently adhered to that bright-line rule since *Spencer*, regardless of the particular factual context. As the Second Circuit summarized the rule in its leading decision, "where federal habeas corpus is not available to address constitutional wrongs, § 1983 must be." *Jenkins v. Haubert*, 179 F.3d 19, 26 (2d Cir. 1999).[1]

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[1] Ignoring the general statutory construction relied upon in *Jenkins*, respondents suggest that *Jenkins* has little importance because the specific facts of *Jenkins* (involving a prisoner's allegation that he was denied procedural due process prior to being forced to serve 30 days of his sentence in solitary confinement) did not "implicate *Heck*'s 'favorable-termination'

The Second Circuit followed *Jenkins* in two decisions applying this bright-line rule. *Leather v. Eyck*, 180 F.3d 420, 424 (2d Cir. 1999) (Calabresi, J.), permitted a person convicted and fined for a criminal offense, who never appealed his conviction, to file a Section 1983 action alleging selective prosecution because he "is not and never was in the custody of the State" and thus "has no remedy in habeas corpus." In *Green v. Montgomery*, 219 F.3d 52 (2d Cir. 2000) (Calabresi, J.), the Second Circuit addressed a Section 1983 action brought by a juvenile who was convicted on reckless endangerment and stolen property charges and who *after* his release from custody filed a Section 1983 action for damages relating to his arrest and prosecution. *Id.* at 55. The Second Circuit allowed the suit, again applying a bright-line rule. It reiterated "that *Heck* acts only to bar § 1983 suits when the plaintiff has a habeas corpus remedy available to him (i.e., when he is in state custody)." *Id.* at 60 n.3. "Because it does not appear that [plaintiff] is presently in state custody," the court held, "his § 1983 action is not barred by *Heck*." *Id.*

Respondents recognize that both *Leather* and *Green* are decisions "implicating *Heck*'s rule." Opp. 11. However, they dismiss them as "idiosyncratic decisions," Opp. 11, that are based on "faulty reasoning." Opp. 10. To the contrary, these decisions are well rooted in the text and purpose of the relevant statutes, as explicated in the analysis of Justice Souter that garnered four votes in *Heck*, and five votes in *Spencer*. In any event, respondents' criticisms are merits arguments that should be reserved for the merits stage.

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prerequisite." Opp. 12. Despite the narrow factual circumstances presented in *Jenkins*, it appears to be the most widely cited post-*Spencer* lower court decision on this subject. Indeed, the importance of *Jenkins* is such that a leading law review recently devoted an entire essay to a critique of its reasoning. Jason A. Jones, Note, *Prisoner Litigation and the Mistake of* Jenkins v. Haubert, 86 Cornell L. Rev. 140 (2000).

Respondents are similarly dismissive, *see* Opp. 9-10 & n.19, 12, of the three recent Seventh Circuit decisions cited by Randell. Pet. 13. In particular, these decisions illustrate the powerful effect on some federal judges of the position articulated by five Justices in *Spencer v. Kemna*. Before *Spencer*, the Seventh Circuit was one of the courts most insistent that *Heck's* favorable-termination requirement applies regardless of whether the Section 1983 plaintiff is still in custody; based on *Spencer*, the Seventh Circuit has reversed its position. *See* Jones, *supra* note 1, 86 Cornell L. Rev. at 153-54. In particular, respondents ignore Chief Judge Posner's view that *Spencer* requires use of a bright-line rule under which "a prisoner who cannot challenge the validity of his conviction" or other sanction "by either appeal or postconviction procedure can do so by bringing a civil rights suit for damages under 42 U.S.C. § 1983." *Carr v. O'Leary*, 167 F.3d 1124, 1127 (7th Cir. 1999) (citing *Spencer*). Chief Judge Posner's view of *Spencer* is shared by the Second Circuit, but is contrary to the law of the First, Fifth, Sixth and Ninth Circuits. Pet. 13-14. This Court should grant review to decide who is correct, so that the civil rights of Section 1983 plaintiffs do not vary from state to state, depending on where the plaintiff resides.

Respondents close their opposition by contending that "any division among the courts . . . is shallow at best and remains undeveloped." Opp. 13. But the dispute over whether a person who is not in custody under a criminal conviction is free to pursue Section 1983 litigation unhindered by the strictures of habeas corpus litigation is hardly new. More than a quarter century ago, Judge Newman noted the "absence of helpful legislative history" on this issue, and stated that plausible arguments can be made on both sides. *Pueschel v. Leuba*, 383 F. Supp. 576, 581 (D. Conn. 1974). In 1988 a leading scholar in this area noted the split in the lower courts over "whether section 1983 may be used to attack a conviction when federal habeas corpus is not available because, for example, the individual commencing the proceeding is not in custody." Martin A. Schwartz, *The* Preiser *Puzzle: Continued Frustrating Conflict*

Between the Civil Rights and Habeas Corpus Remedies for State Prisoners, 37 DePaul L. Rev. 85, 126 (1988); *see also id.* at 139-43. Even after this Court's decisions in *Heck* and *Spencer*, the federal appellate courts are still divided on this question, Pet. 11-14, as are the district courts. *See* Jones, *supra* note 1, 86 Cornell L. Rev. at 155-56. A definitive resolution of this question should be provided as soon as possible.

2. The question presented is adequately presented by Randell's case, as Randell filed his lawsuit while no longer in custody on the sentence at issue, and the relevant factual allegations are uncontroverted

Apart from their efforts to minimize the significance of the circuit split over the proper application of *Heck* and *Spencer*, respondents urge that "this case simply does not raise" the question presented by the petition. Opp. 5. They are mistaken.

The question presented by the petition and which divides the lower courts is whether *Heck*'s favorable-termination requirement — originally articulated in a case where a prisoner sought to use Section 1983 to indirectly win his release without meeting the habeas requirements — has any application to a plaintiff who is *not* in custody and hence is not eligible to seek habeas relief. Pet. i.

For a plaintiff to properly present this question to this Court, the lawsuit need only challenge the fact or duration of past confinement, and allege that the plaintiff is not in custody on the sentence in question. Randell's lawsuit does that. Respondents agree that Randell's lawsuit alleges the following facts: (1) Randell was sentenced to 60 months of incarceration; (2) while out on parole before serving the full sentence, Randell was arrested on a DWI charge; (3) because of a "blue warrant" detainer imposed by respondents, Randell could not make bond but instead was held under the blue warrant from September 27, 1996, to June 26, 1997; (4) Randell never received credit for these 272 days of incarceration toward the completion of his 60-month sentence, so that he was forced to serve part of his time

over again, beyond the term of his lawful sentence; and (5) when Randell filed his present lawsuit, on June 18, 1999, he had fully served his 60-month sentence, and was no longer in custody on it. Pet. 2-3; Opp. 2-3.[2] These allegations are more than enough for Randell's case to serve as an adequate vehicle for resolving the question presented. *Compare Green*, *supra*, 219 F.3d at 55, 60 n.3 (resolving this question in favor of the Section 1983 plaintiff with minimal reference to the facts, noting: "Because it does not appear that [plaintiff] is presently in state custody, his § 1983 action is not barred by *Heck*.").

Respondents argue that under *Spencer v. Kemna*, to avoid *Heck*'s favorable-termination requirement it is not enough for Randell to show that he is ineligible for habeas relief because he is no longer in custody. According to respondents, Randell was required to allege that "he lacked any other avenue to correct the alleged error in his TDCJ sentence." Opp. 5. But respondents never advanced this argument below (indeed, they never even appeared below), and thus they have waived the ability to advance it in this Court. *E.g.*, *Jenkins v. Anderson*, 447 U.S. 231, 234-35 n.1 (1980); *FTC v. Grolier, Inc.*, 462 U.S. 19, 23 n.6 (1983); *Lytle v. Household Mfg., Inc.*, 494 U.S. 545, 551-52 n.3 (1990); *Trest v. Cain*, 522 U.S. 87, 89 (1997). The district court based its dismissal solely on the fact that Randell had not won habeas relief — relief that he concededly is not eligible to seek. App. 6a; *see also* Pet. 4 n.2.

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[2] Seeking for the first time to offer a factual defense to these allegations, respondents observe that Randell "does not explain if these nine months were a sentence for the DWI offense." Opp. 3; *see also* Opp. 8 (asserting that this is a "critical fact" that "remains unclear"). But there is no indication in the record that Randell was even convicted, much less sentenced, on the DWI charge that triggered his blue-warrant detention pending a ruling on parole revocation. Randell's allegation that he was held for 272 days under a detainer that prevented him from making bond on the DWI charge, and that he never received credit for this time, is uncontroverted. And given that the denial of credit for this time was mandated by the relevant Texas statute, *see* pp. 7-8 & note 3, *infra*, there is no evident basis for questioning this allegation.

Even if respondents had not waived this point, they have identified no vehicle other than this Section 1983 action by which Randell might be able to remedy his injury. Because this action is Randell's sole federal remedy, any alternative remedy would have to lie under Texas law. But respondents do not suggest that their actions even arguably violated Texas law. It would appear that respondents complied with Texas law in denying Randell credit for the 272 days he was held for an alleged parole violation, pending his parole revocation hearing and the actual revocation of his parole. Apparently unique among the 50 States, Texas by statute provides that if "a person's parole . . . is revoked," his or her remaining sentence "is computed *without credit* for the time from the date of the person's release *to the date of revocation*." Tex. Gov't Code Ann. § 508.283(b) (Vernon Supp. 2000) (emphasis added). This provision dates to 1973, when the legislature eliminated a provision that had entitled an alleged parole violator to "time credit for any period" of incarceration "after his arrest on the parole revocation charges." *Ex parte Canada*, 754 S.W.2d 660, 661-62 n.2 (Tex. Crim. App. 1988).

Pursuant to the "mandatory language" of this statute, *id.* at 664, which was most recently continued in force and amended in 1999, Texas officals are required to deny alleged parole violators credit for the weeks or months they are held under blue warrants prior to any ultimate revocation of their parole.[3] Further, parole

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[3] In *Ex parte Canada*, a prisoner brought a challenge to this mandatory statutory provision, but the Texas courts held that the prisoner lacked standing to object to it. 754 S.W.2d at 664-65. The *Canada* decision did invalidate a statutory provision that gave officials *discretionary* authority to deny alleged parole violaters credit for time served under a blue warrant even where their parole is continued following the parole revocation hearing. *Id.* at 662, 665-68; *see also Ex parte Price*, 922 S.W.2d 957, 958 (Tex. Crim. App. 1996) ("In *Canada*, we held that Article 42.18, § 15(a), V.A.C.C.P., as it relates to the discretion to grant or deny time credit to a parolee confined pursuant to a pre-revocation warrant, is violative of parolee's due course of law under Tex. Const., Art. I, § 19."); *Ex parte Bates*, 978 S.W.2d 575, 576-78 (Tex. Crim.

violators like Randell who do not waive their right to a parole revocation hearing, whose parole is ultimately revoked, and who thereby end up serving more than their lawful sentence, are excluded from the remedy enacted by the Texas legislature for victims of wrongful imprisonment. *See* Tex. Civ. Prac. & Rems. Code Ann. § 103.001 (Vernon 1997) (providing compensation only to persons who served time and were "not guilty of the crime" and have "received a full pardon"); *see also* Tex. Const., Art. 3, § 51-c (state legislature only authorized to "grant aid and compensation" to a person who "served a sentence in prison . . . for an offense for which he or she is not guilty.").

Unable to identify an alternative remedy under Texas law that Randell might now pursue, respondents focus on Randell's past actions. Respondents complain that Randell does not allege "that he attempted to correct the alleged error in his term of confinement through notice to TDCJ via the prison grievance system." Opp. 6; *see also* Opp. 8. But a grievance system for remedying "a complaint by an inmate who alleges that time credited on the inmate's sentence is in error," Tex. Gov't Code Ann. § 501.0081(a) (Vernon Supp. 2000), did not even *exist* in Texas until January 1, 2000, several months after this lawsuit was filed, and several years after the underlying events took place. *See Ex parte Whiteside*, 12 S.W.3d 819, 824 (Tex. Crim. App. 2000) (Johnson, J., concurring)).

Const., Art. I, § 19."); *Ex parte Bates*, 978 S.W.2d 575, 576-78 (Tex. Crim. App. 1998) (summarizing *Canada* holding, and applying it to eliminate trial court discretion in an analogous context); *Jimerson v. State*, 957 S.W.2d 875, 877 (Tex. App. Texarkana 1997) (*Canada* held "that the statute was unconstitutional so far as it granted discretion to grant or deny credit to a parolee for the time spent in confinement before the revocation hearing."); *Ex parte Adams*, 941 S.W.2d 136 (Tex. Crim. App. 1997); *Ex parte Evans*, 964 S.W.2d 643 (Tex. Crim. App. 1998).

Respondents also complain that "Randell does not allege that he sought habeas relief while incarcerated." Opp. 6. But respondents failed to argue below that Randell was required to address this factual point, thereby disabling them from arguing it at this juncture. See p. 6, *supra*. If this Court ultimately decides the question presented by articulating a legal rule under which this factual point is somehow relevant, respondents will presumably raise the point on remand. Randell is prepared to prove that he did seek habeas relief while incarcerated.

In sum, this case adequately presents the question set forth in the petition. This Court should grant review to decide that question and thereby resolve the confusion over *Heck* and *Spencer* that currently exists in the lower courts.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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